

SUPREME COURT OF NEW JERSEY  
DOCKET NO. A-50-12 (072323)

	:	
	:	Criminal Action
	:	
STATE OF NEW JERSEY,	:	On Leave to Appeal from an
Plaintiff-	:	Order of the Superior Court,
Respondent	:	Appellate Division
v.	:	No. A-_____
	:	
GIUSEPPE TEDESCO	:	Sat below: Judges Parrillo,
Defendant-	:	P.J.A.D and Fasciale, J.A.D.
Appellant	:	

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BRIEF OF *AMICUS CURIAE*  
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

*Amicus curiae* American Civil Liberties Union of New Jersey (ACLU-NJ) is a private non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the Constitution. Founded in 1960, the ACLU-NJ has approximately 15,000 members and donors in the State of New Jersey. The ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes, and is composed of approximately 500,000 members and donors nationwide.

The participation of *amici curiae* is particularly appropriate in cases with "broad implications," *Taxpayers Ass'n. of Weymouth Twp. v. Weymouth Twp.*, 80 N.J. 6, 17 (1976), *cert. denied*, 430 U.S. 977 (1977), or in cases of "general public interest." *Casey v. Male*, 63 N.J. Super. 255, 259 (Co. Ct. 1960) (history and parameters of *amicus curiae* participation). This is such a case, as it raises far-reaching questions about the purpose of sentencing hearings.

The ACLU-NJ has participated as direct counsel or *amicus curiae* in several cases implicating fairness concerns in the criminal justice system, particularly regarding sentencing. See, e.g., *State v. L.H.*, 206 N.J. 528 (2011) (controversy regarding award of gap-time credit); *Riley v. New Jersey State Parole Bd.*, 423 N.J. Super. 224 (App. Div. 2011), *certif.*

*granted*, 209 N.J. 596 (2012) (challenge to Sex Offender Monitoring Act); *State ex rel. County of Cumberland v. One 1990 Ford Thunderbird*, 371 N.J. Super. 228 (App. Div. 2004) (challenging forfeiture process); *State v. Natale*, 178 N.J. 51 (2003) (*ex post facto* challenge to NERA); *Doe v. Poritz*, 142 N.J. 1 (1995) (challenge to Megan's Law notification).

#### **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

For the purposes of this appeal, *amicus curiae* ACLU-NJ, accepts the facts and procedural history as found by Judge Parrillo in his Order on Emergent Application dated March 18, 2013, (hereinafter "Order on Emergent Application") with the following limited additions:

Defendant sought leave to appeal, which was granted on March 19, 2013. The Court entered a peremptory briefing schedule, requiring that any *amicus curiae* motion be filed on or before April 2, 2013.

The ACLU-NJ filed a Motion for Leave to Appear as *Amicus Curiae* simultaneously with this brief. R. 1:13-9.

#### **SUMMARY OF ARGUMENT**

In considering whether a trial court can compel a defendant to appear at sentencing, this Court must examine the purposes of a sentencing hearing. The hearing is intended to provide the judge with information necessary to make reasoned determinations of aggravating and mitigating factors and ultimately craft an

appropriate sentence. However, the hearing is not intended to be punitive in and of itself. The lower courts in this matter erred by in effect making the process the punishment, by admittedly using the sentencing *hearing* to force a defendant - prior to imposition of sentence - to "atone[] for his wrongful acts" and face "opprobrium."

The Crime Victim's Bill of Rights does not alter the nature of the sentencing hearing. Crime victims' role in the trial process is appropriately significant. Most notably, the Crime Victim's Bill of Rights ensures the opportunity for the victims of crimes (or in the case of a homicide, the victim's close family members) to address the court at sentencing. However, the right to address *the court* is distinct from the right to confront the defendant directly (which is not authorized by the statute). At the same time, a defendant's absence from a sentencing proceeding in no way diminishes the family's ability to meaningfully participate in the process. Simply put, a court cannot compel the defendant's presence at the sentencing hearing at the victim's behest in order to force the defendant to "atone[] for his wrongful acts" and be subjected to "the opprobrium of the Court for his devastating actions," prior to imposition of sentence.

## ARGUMENT

### I. THE PURPOSE OF A SENTENCING HEARING IS TO GUIDE THE JUDGE IN MAKING AN INFORMED DECISION ABOUT SENTENCING RATHER THAN TO PUNISH THE DEFENDANT

The purpose of a sentencing hearing is to provide the opportunity for a judge to obtain "the fullest information possible concerning the defendant's life and characteristics," (*State v. Marzolf*, 79 N.J. 167, 176-77 (1979) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949))), in order to determine the appropriate "kind and extent of punishment to be imposed within limits fixed by law." *State v. Natale*, 184 N.J. 458, 472 (2005) (quoting *Williams*, 337 U.S. at 246). See also *Natale*, 184 N.J. at 472 (quoting *State v. Green*, 62 N.J. 547, 566 (1973)) ("The goal is to provide the sentencing judge with the 'composite picture of the 'whole man.'"). Thus, while the purpose of the ultimate sentence is to impose punishment, the purpose of the sentencing *hearing* is not; rather, the hearing provides the process by which the fair and appropriate sentence is reached.

Running through our sentencing jurisprudence is a requirement that sentences be meted out fairly and uniformly. *State v. Kromphold*, 162 N.J. 345, 352 (2000). To ensure that that occurs, sentencing hearings must themselves be conducted fairly and therefore a sentencing hearing must include consideration of, at a minimum: presentence reports (R. 3:21-2;



*N.J.S.A.* 2C:44-6; see *State v. Mance*, 300 *N.J. Super.* 37, 65 (App. Div. 1997) (ordering remand where 13-year-old PSR was used for sentencing)); statements by victims regarding the impact of the crime, where appropriate (*N.J.S.A.* 52:4B-36n); and a defendant's statement of allocution, should he desire to make one (*R.* 3:21-4(b); *State v. Cerce*, 46 *N.J.* 387, 393-95 (1966)). However, a defendant also has the right to waive his appearance at the hearing. *R.* 3:21-4(b).<sup>1</sup> After receiving the evidence, the judge must engage in a "careful application of statutory aggravating and mitigating factors." *State v. Cassady*, 198 *N.J.* 165, 179-80 (2009). Punishment is not meted out until the conclusion of the hearing, i.e., after the evidence is heard and after a weighing of the mitigating and aggravating factors.

It is axiomatic that punishment cannot occur before a determination of guilt. *United States v. Salerno*, 505 *U.S.* 317, 372 (1992). Likewise, it is equally inappropriate to impose punishment in the interstices between verdict and the pronouncement of the sentence. See, e.g., *State v. Vendrell*, 197 *N.J. Super.* 232, 237 (App. Div. 1984) (noting that "the

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<sup>1</sup>There are often strategic reasons why a defendant chooses to invoke that right after consulting with counsel. This case appears to be a perfect example of such a strategy, where the record shows a history of confrontation between the defendant and the victim's family during the trial process. See *Order on Emergent Application* at 2. ("Several times during the trial and deliberations there were outbursts in the gallery requiring interventions by court officers. . . .")

final determination of the cause' " with respect to bail is not triggered "until the time of sentencing and entry of the judgment of conviction").<sup>2</sup>

In reaching the conclusion that a judge can order a defendant to appear at a sentencing hearing upon the motion of a victim, the trial court's analysis (adopted by the Appellate Division) fundamentally misconstrues the nature of the sentencing hearing. The courts below effectively conflated the purpose of imposing sentence with the purpose of the process by which that sentence is reached. Specifically, by using the hearing as a method to force a defendant to "face those whose lives he has touched. . .[as] atonement for his wrongful acts" (Order on Emergent Application at 3) and "directly hear the opprobrium of the Court for his devastating actions," (*id.*), the lower courts' holding transforms the sentencing process itself into an aspect of the punishment. The defendant would thus be subject to punitive measures prior to the judge's determination of what kind and degree of punishment is appropriate.

Forcing an individual to "atone," i.e., requiring one to make amends for one's wrongdoing, has not only long been

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<sup>2</sup> While bail is sometimes revoked after a determination of guilt, that is because the risk of flight increases, not because punishment has commenced. *State v. Ceylan*, 352 N.J. Super. 139, 144 (App. Div. 2002) (noting that "bail is customarily revoked following conviction by a jury on second-degree charges, since it is apparent that the risk of flight increases").

recognized as punitive in nature, but has also been rejected as a valid basis upon which to craft a criminal sentence. *State v. Moore*, 21 N.J. Super. 419, 423 (App. Div. 1952). More than six decades ago, the Appellate Division referred to atonement as an "old and now discredited theory" of punishment. *Id.*

Similarly, at the core of "opprobrium" is a showing of contempt that results in a "public disgrace" or "shaming." See "opprobrium." Merriam-Webster.com. 2013. <http://www.merriam-webster.com> (28 March 2013). As with "atonement," historically this type of punishment was a component of criminal sanctions, but has long since been rejected. See *Doe v. Poritz*, 142 N.J. at 138-41 (Stein, J., dissenting) (providing thorough discussion of the use of, and rejection of, such sanctions).

As held by this Court, the appropriate penological purposes for which to impose criminal sanctions are no longer "atonement" or "public disgracing" but, rather, "deterrence (both general and specific), retribution, and rehabilitation." *State v. Ramseur*, 106 N.J. 123, 178 (1987).

Regardless of whether or not "atonement" or "public disgracing" remain justifiable bases for criminal sanctions, it is improper to utilize the judicial process itself as a means of imposing those punitive goals. As noted, a sentencing hearing is intended to provide a judge with information required to determine - and ultimately impose - an appropriate sentence; the

hearing is not intended to be punitive in and of itself. The lower courts in this matter erred by making the process part of the punishment.<sup>3</sup>

## **II. THE CRIME VICTIM'S BILL OF RIGHTS PROVIDES VICTIMS THE RIGHT TO ADDRESS THE COURT, BUT NOT TO COMPEL A DEFENDANT'S PRESENCE AT A SENTENCING HEARING**

Crime victims in New Jersey are vested with a multitude of rights through both statute and the State Constitution. N.J.S.A. 52:4B-36; N.J. Const. art. 1, Paragraph 22. Among the general rights granted to victims is the right to "be treated with fairness, compassion and respect by the criminal justice system." N.J. Const. art. 1, Paragraph 22. The statute also

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<sup>3</sup> Likewise, the lower courts erred in basing their decisions, in part, on the fact that the court process must be open to the public. The lower courts appropriately noted that "The Sixth Amendment right to a public trial not only protects a defendant's interest and legitimizes the proceedings by subjecting the Court's decisions to public scrutiny, but also ensures the continued faith and involvement of society in the criminal justice system." (Order on Emergent Application at 3); see, e.g., *Waller v. Georgia*, 467 U.S. 39, 46 (1984). But the right to a public trial is irrelevant to the question at hand. Defendant does not seek to have his sentencing hearing conducted in private; he simply seeks to absent *himself* from the proceeding. No one doubts that "[p]ublic scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 606 (1982). Nor is there any reasonable debate that "public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process." *Id.* Society will be well-served to observe the sentencing hearing, but the proceeding gains no greater legitimacy by mandating defendant's presence.

requires that crime victims be "treated with dignity. . . ." N.J.S.A. 52:4B-36a.

In addition to the general requirements that crime victims receive appropriate treatment in the criminal justice system, they are protected by several particular entitlements. N.J.S.A. 52:4B-36. Victims are entitled to "make, prior to sentencing, an in-person statement directly to the sentencing court concerning the impact of the crime." N.J.S.A. 52:4B-36n. Additionally, victims may "appear in any court before which a proceeding implicating the rights of the victim is being held, with standing to file a motion or present argument on a motion filed to enforce any right conferred" by the statute or Article I, paragraph 22 of the New Jersey Constitution. N.J.S.A. 52:4B-36r. Nothing in either those general protections or specific entitlements implicates a defendant's waiver of his right to be present at trial.

In the present case, the victim's mother,<sup>4</sup> Michelle Ruggieri, sought not to enforce rights enumerated in the statute but, rather, sought to compel defendant to appear at sentencing. In support of this motion, Ms. Ruggieri's brief cites to several

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<sup>4</sup> While Michelle Ruggieri is the mother of the homicide victim, she is, of course, a victim in her own right and entitled to all the protections of the Crime Victim's Bill of Rights. N.J. Const. art. 1, Paragraph 22 ("victim of a crime means . . . the . . . parent . . . of the decedent in the case of a criminal homicide").

instances where our courts have recognized the rights of crime victims to have a voice in criminal trials. RuBr 3-4.<sup>5</sup> However, unlike the present case, in each of the instances cited by Ms. Ruggieri, the victims faced the risk that their statutory or constitutional rights would be imperiled.<sup>6</sup> That is not the case here.

In the present case, the right held by the victim - to make "an in-person statement *directly to the sentencing court* concerning the impact of the crime" - is not at issue. N.J.S.A. 52:4B-36n (emphasis added). The right to address *the court* is distinct from the right to confront the defendant, which there is no statutory right to do. Likewise, the defendant's right to

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<sup>5</sup> RuBr refers to Michelle Ruggieri's brief submitted to the Appellate Division on March 14, 2013.

<sup>6</sup> In *State v. Muhammad*, the Court considered a challenge to the entitlement of victim's families to provide "victim-impact testimony" in capital trials. 145 N.J. 23, 30 (1996). If a court precluded the family from delivering a victim-impact statement, the threat to the statutory and constitutional rights of the family was plain: the laws of the state provided that victims were entitled to address the jury in certain circumstances. In *State v. Timmendequas*, the court planned to change the venue from Mercer County to Camden County. 161 N.J. 515, 552-55 (1999). The victim's family provided affidavits indicating that travel would be an extreme hardship. *Id.* at 553. Because victims have a right to attend "any judicial proceeding involving a crime," N.J.S.A. 52:4B-36p, there existed a real risk that - but for judicial intervention - the victims statutory rights would have been violated. Finally, in *State in the Interest of K.P.*, the Chancery Division considered a request by a victim that the media be barred from a hearing at which she would testify. 311 N.J. Super. 123, 125-26 (Ch. Div. 1997). The court identified "compelling evidence that a detrimental effect upon a victim will occur if the court" allowed the media access to the hearing. *Id.* at 134.

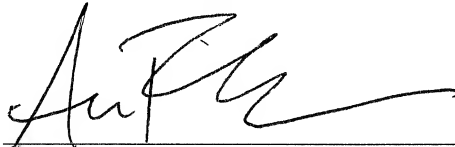
waive his appearance at sentencing does not impact the general statutory and constitutional provisions that victims be treated with fairness, compassion, respect, and dignity. Indeed, a defendant's absence from a sentencing proceeding in no way diminishes the family's ability to meaningfully participate in the process before the court.

The cases cited by the movant in her brief illustrate the proposition that victims appropriately have standing when there is a proceeding that implicates the *rights* of the victim as set forth in the Crime Victims Bill of Rights. The cases do not, however, go so far as to allow victims to compel court action in other aspects of the court process, when their unique rights are not implicated.

## CONCLUSION

Requiring a defendant to appear at a sentencing hearing transforms the sentencing process into a portion of the actual punishment. Such a transformation is contrary to the robust jurisprudence regarding sentencing, does not benefit society, and is not required by the Crime Victim's Bill of Rights. Accordingly, this Court must reverse the decision of the Appellate Division and allow Defendant to waive his presence at sentencing.

Respectfully submitted,



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Dated: 4/1/13